

CITIZEN SUIT LITIGATION:

THE NGOs END RUN AROUND
THE REGULATORY PROCESS

THREE TYPES OF CITIZEN SUITS

CITIZEN SUITS ARE “PRIVATE ATTORNEY GENERAL” STATUTES – PROVIDE ANY PERSON THE RIGHT TO SUE WHERE THE GOVERNMENT DOES NOT ACT AND COURT MAY AWARD COSTS OF LITIGATION TO THE SUBSTANTIALLY PREVAILING PARTY

- TYPE 1: FOR INJUNCTIVE RELIEF AGAINST EPA WHERE THE AGENCY FAILS TO PERFORM A NON-DISCRETIONARY DUTY
 - CAA Section 304 (a)(2)
 - CWA Section 505 (a) (2)
 - RCRA Section 7002 (a)(2)
 - CERCLA Section 310(a) (2)
 - SDWA Section 1449(a)(2)
 - TSCA Section 20(a)(2)
 - ESA Section 10(g)(1)(C)

THREE TYPES OF CITIZEN SUITS

- TYPE 2 – FOR INJUNCTIVE RELIEF AGAINST ANY PERSON INCLUDING THE UNITED STATES FOR CONTINUING OR INTERMITTENT VIOLATIONS
 - NO ACTION FOR WHOLLY PAST VIOLATIONS
 - COURT CAN AWARD PENALTIES BUT GO TO THE UNITED STATES
 - CAA Sections 304 (a)(1) (emission standards or limitations and orders related thereto); Section 304 (a)(3) (construction or modification of major source without permit)
 - CWA Section 505 (a)(1) (effluent standard or limitations and orders related thereto)
 - RCRA Section 7002 (a)(1)(A) (violation of any permit, standard, regulation, requirement, prohibition or order)
 - CERCLA Section 310 (a)(1) (violation of any standard, regulation, condition, requirement, or order)

THREE TYPES OF CITIZEN SUITS

- TYPE 2 - CONT'D
 - SDWA Section 1449 (a)(1) (violation of any requirement of the statute including standards); Section 1449 (a)(3) (against any Federal agency that fails to collect a penalty issued under the statute)
 - TSCA Section 20 (a)(1) (violations of a testing rule, pre-manufacture notice, rule regulating hazardous chemicals and mixtures under Section 6, asbestos regulation under subchapter and lead exposure regulation under subchapter 4)
 - ESA Section 10 (g)(1)(A) (restrain violations of violations of the statute or regulations)
 - OSCOLA Section 23 (a)(1) (to compel compliance or restrain violation of the subchapter , or the terms of any permit or lease issued by the Secretary)

THREE TYPES OF CITIZEN SUITS

- TYPE 3 - IMMINENT AND SUBSTANTIAL ENDANGERMENT
RCRA 7002 (a)(1)B) provides that:

Any person may commence a civil action on his own behalf...
(B) **against any person**, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of **any solid or hazardous waste** which **may** present an **imminent and substantial endangerment** to health or the environment

- DISTRICT COURTS HAVE JURISDICTION TO RESTRAIN ANY PERSON WHO HAS CONTRIBUTED OR IS CONTRIBUTING TO THE ALLEGED HAZARDOUS CONDITION

CITIZEN SUIT POWER SURGE

- ICO ET AL v. HONEYWELL INTERNATIONAL ET AL (D.NJ. 2003)

"Either way, said Joe Morris, a community activist in New York City, "It's a bigger story than Love Canal," the contaminated neighborhood in Niagara Falls, N.Y., that led to the creation of the federal Superfund program in 1980. "In terms of scale, there's nothing quite like it." "

"The saga took a twist last month when a federal judge ordered New Jersey-based Honeywell, a successor to the company that polluted the drive-in, to excavate the tainted dirt and find ways to stop chromium from entering the groundwater and the river."

Cleanup Helps Jersey City, N.J., Slip Out of Chromium..., 2003 WLNR 13893728

NewsRoom

6/15/03 Dallas Morning News (Pg. Unavail. Online)
2003 WLNR 13893728

Dallas Morning News, The (KRT)
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June 15, 2003

Cleanup Helps Jersey City, N.J., Slip Out of Chromium Waste's Poisonous Grasp

Jim Morris

Jun. 15--JERSEY CITY, N.J. In the old days, local kids called them chemical mountains big heaps of slag, ideal for climbing and bike-riding, scattered about a decaying industrial city.

By Jim Morris, The Dallas Morning News

Jun. 15--JERSEY CITY, N.J. In the old days, local kids called them chemical mountains big heaps of slag, ideal for climbing and bike-riding, scattered about a decaying industrial city.

When it rained, streams of bright yellow would emerge from the mounds and flow into parking lots, back yards, basements and the Hackensack River. In winter, one could ice-skate on fluorescent, frozen wetlands.

Everything changed in the early 1980s. Investigators disclosed that the colorful discharges were, in fact, proof that much of the city was contaminated with hexavalent chromium, a toxic metal linked to lung cancer and other ailments.

During the first half of the 20th century, homes, schools and businesses had been built atop 2 million to 3 million tons of chromium-laden fill material, donated or sold by three chemical companies eager to get rid of their waste. The main poison embedded in that waste a substance so virulent it could bore holes in a person's nasal septum was escaping.

This revelation, which began with a Texan named Earl Aldredge, created a furor in the community. Environmental specialists began combing the city for dumpsites. Health studies commenced. Public cries for relief were cacophonous, and some cleanups were completed.

And then, after a decade or so, the clamor died down. All but a few people lost interest or gave up. The limitations of state environmental enforcement became painfully clear.

Today, more than 20 years after Mr. Aldredge, then a young city inspector, followed a yellow rivulet landward from the river, Jersey City still rests atop some of the most polluted soil in America. It's a story that began in the 19th century and will end, presumably, sometime in the 21st.

Some say it's a paradigm of growing anti-regulatory sentiment in the United States: large corporations, facing millions of dollars in liability, resisting demands for expensive, full-scale cleanups, setting the stage for the sort of standoff that has kept the biggest chromium field in Jersey City 34 acres once occupied by a drive-in theater from being neutralized.

LARGER THAN WTC EXCAVATION



ELEMENTS OF THE CLAIM

- **Prima Facie Elements of Liability Under RCRA 7002 (a)(1)(B)**
 - Defendant must be a person who “**has contributed to or is contributing to** the past or present handling, storage, treatment, transportation or disposal”
 - “of a solid or hazardous waste”
 - “which **may** present an imminent and substantial endangerment to human health **or** the environment.”

CLAIM ELEMENTS- CONT'D

- The Heart of the Case: “May Present An Imminent And Substantial Endangerment” to health or the environment
 - “May” is an expansive term; applies to both emergent and non-emergent conditions
 - “Imminent” means that only the risk must be encountered near term – not the harm.
 - “Endangerment” is a probabilistic concept and means that there exists only a risk of harm and not necessarily actual harm.
 - “Substantial” equates to a serious harm

DEFENSES

- PLAINTIFF HAS FAILED TO SERVE A 90 DAY PRE-SUIT NOTICE TO THE EPA ADMINISTRATOR, THE STATE OF THE VIOLATION, AND ALL OF THE ALLEGED DEFENDANTS – JURISDICTIONAL REQUIREMENT
- EPA “HAS COMMENCED AND IS DILIGENTLY PROSECUTING” A RCRA SECTION 7003 OR CERCLA SECTION 106 ACTION
- EPA IS ENGAGED IN AN EMERGENCY REMOVAL ACTION UNDER CERCLA SECTION 104 OR HAS INCURRED RI/FS COSTS AND IS DILIGENTLY PURSING REMEDIATION
- EPA HAS OBTAINED A COURT ORDER OR ISSUED AN ORDER UNDER CERCLA SECTION 106 OR RCRA 7003 AND THE RESPONSIBLE PARTY IS DILIGENTLY PURSUING THE ACTION REQUIRED

DEFENSES – CONT'D

- STATE HAS COMMENCED AND IS DILIGENTLY PROSECUTING A RCRA SECTION 7002 (a)(1)(B) ACTION
- STATE IS ENGAGED IN AN EMERGENCY REMOVAL ACTION UNDER CERCLA SECTION 104
- STATE HAS INCURRED RI/FS COSTS AND IS DILIGENTLY PROCEEDING WITH A REMEDIAL ACTION
- PLAINTIFF LACKS STANDING
- PLAINTIFF CANNOT PROVE THE FOUR REQUIRED ELEMENTS FOR AN INJUNCTION: PARTICULARLY THAT THE “BALANCE OF EQUITIES DOES NOT FAVOR PLAINTIFF”
- INJUNCTIVE RELIEF CAN NOT GO BEYOND WHAT IS “NECESSARY” TO REMEDY THOSE CONDITIONS THAT MAY PRESENT AND IMMINENT AND SUBSTANTIAL ENDANGERMENT”
- EQUITABLE DEFENSES - LATCHES

PRACTICE TIPS

- WORK WITH THE REGULATORS TO RESOLVE WHERE YOU MAY HAVE MORE CONTROL
- EXPERT INTENSIVE – RETAIN BATTLE TESTED EXPERTS
- IN PROFFERING EVIDENCE THAT NO IMMINENT AND SUBSTANTIAL ENDANGERMENT EXISTS FOCUS ON THE EXPOSURE ELEMENT OF RISK ASSESSMENT
- DEFEND ON GROUNDS THAT THE CAUSE OF PLAINTIFF'S ALLEGED INJURY IS NOT A "SOLID WASTE"
- FILE A MOTION TO DISMISS – VERY TECHNICAL ISSUES NEED TO SENSITIZE JUDGE TO PROBLEMS WITH PLAINTIFF'S CASE FROM THE BEGINNING AND KEEP HAMMERING

COMING TO A THEATRE NEAR YOU

October 29, 2015

Via Certified Mail, Return Receipt Requested

Mr. Bob G. Alexander
President and Chief Executive Officer Sandridge Exploration and Production, LLC 1601 Northwest Expressway
Suite 1600
Oklahoma City, OK 73118

Via Certified Mail, Return Receipt Requested

Mr. Kevin A. Easley
President and Chief Executive Officer New Dominion, LLC
1307 South Boulder Ave W # 400 Tulsa, OK 74119

Via Certified Mail, Return Receipt Requested

Mr. Robert D. Lawler
President and Chief Executive Officer Chesapeake Operating LLC
6100 N Western Ave Oklahoma City, OK, 73118

Via Certified Mail, Return Receipt Requested

Mr. J. Larry Nichols
President and Chief Executive Officer Devon Energy Production Co. LP
20 North Broadway
Suite 1500
Oklahoma City, OK 73102-8202

RE: *Notice of Intent to Sue for Violations of the Resource Conservation and Recovery Act Involving Earthquakes Induced by the Injection and Disposal of Oil and Gas Production Wastes into the Ground*

COMING TO A THEATRE NEAR YOU

- 90 Day Statutory Notice

“We are writing on behalf of the Sierra Club¹ ...to provide you with notice of their intent to file suit against Sandridge Exploration And Production, LLC New Dominion, LLC Devon Energy Production Co. LP and Chesapeake Operating LLC for ongoing violations of...RCRA² resulting from the injection and disposal of waste fluids from the oil and fracking industries...into the ground via wells in Oklahoma. This injection has caused ...earthquakes being experienced in Oklahoma and southern Kansas. These earthquakes have already caused injuries and property damage and are threatening much more damage that is potentially devastating.”

COMING TO A THEATRE NEAR YOU

- Relief Sought:
 - 1) “Immediately substantially reduce the amounts of Production Wastes they are injecting into the ground to levels that seismologists believe will not cause or contribute to increased earthquake frequency and severity. ...
 - 2)Reinforce vulnerable structures that current forecasts show could be hit by large magnitude earthquakes during the interim period;
and
 - 3) Establish an independent earthquake monitoring and prediction center”

COMING TO A THEATRE NEAR YOU

- Standard Alleged

“To show such a potential endangerment, Plaintiffs must show that there is some reasonable cause for concern that someone or something may be exposed to a risk of harm.” *Interfaith Community Organization v. Honeywell International, Inc.*, As discussed above, and shown in even more detail below, Defendants have contributed and are contributing to past and present handling, storage, and disposal of Production Wastes which is causing earthquakes that may present an imminent and substantial endangerment to health or the environment. They are therefore jointly and severally liable for the abatement of this endangerment.”